SUPREME COURT, U. S.

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No. 714

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ESTATE OF ELEANOR BUCHANAN TALBOTT, DEC.,
BRYAN CARVER, EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITIONER'S REPLY BRIEF TO THE BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

As stated in the petition. (Pet. 1.)

JURISDICTION

As stated in the petition. (Pet. 1.)

QUESTION PRESENTED

Respondent states that the question is whether the trust is excludible under Sec. 2036(b), IRC 1954, "notwith-

standing the fact that the transfer remained revocable in favor of decedent until after 1931." (Br. 2.)

Petitioner submits that there is no warrant for the quoted statement, either from the facts or from the language of the trust indenture itself.

The power of revocation was not a power which decedent could exercise alone, or exercise with the *consent* of her husband, or after his death, with the *consent* of the remainderman. The power was exercisable only by the *joint action* of decedent and her husband, or by the *joint action* of decedent and the remainderman after her husband's death. Moreover, the instrument of revocation was required to have the same formality as a deed of real property for record in the State of New York and to "direct the disposition to be made of the trust fund or the portion hereof affected by such revocation." (Pet. A4.) There was no requirement that the trust fund be returned to decedent in the event of revocation. Her husband and, after his death, the remainderman had equal power with decedent to direct the disposition of the trust fund. This unequivocal language of the trust indenture precludes the conclusion that "the transfer remained revocable in favor of decedent until after 1931."

ARGUMENT

1. Respondent devotes the major part of his brief in opposition to an argument that the decision of the court below is correct, which petitioner understands would be the question for this Court to decide only in the event a writ of certiorari is granted. (Br. 4-8.) In view of respondent's contention, petitioner deems it proper to reply briefly to his argument regarding the correctness of the decision below.

No question arises as to whether decedent made a transfer at death—the only question being the date of the transfer in trust during her lifetime. This turns on—

Whether the word "transfer" has the same meaning in Subsection (b) as it has in Subsection (a) of Sec. 2036, IRC 1954. (Pet. 2, 3 for complete section.)

The Second and the Third Circuits and the Tax Court uniformly have held that the word "transfer" has the same meaning in both subsections. (Pet. 5, 6.) The court below held to the contrary, thus giving rise to the conflict. (Pet. 4, 5, A11, A18, A21.) Petitioner submits that the decision below is wrong.

Subsection (a) is captioned "General Rule." All courts agree that the General Rule includes both revocable and irrevocable transfers. Subsection (b) provides "This section shall not apply to a transfer made before March 4, 1931." The words "this section" necessarily mean Sec. 2036, which includes Subsection (a), the General Rule.

To clinch the Congressional intent that revocable and irrevocable transfers are embraced by the word "transfer" in Subsection (b), this subsection is captioned "Limitation on Application of General Rule." If the General Rule in Subsection (a) includes both revocable and irrevocable transfers, and if the General Rules is not applicable to transfers made before March 4, 1931, then it must follow that any transfer, whether revocable or irrevocable, made before March 4, 1931 is excluded from the decedent's gross estate under Subsection (b).

2. Where the language of a statute is clear and unambiguous, as Sec. 2036, this Court has held that there is no need to resort to legislative history. (Pet. 8, 9.) Moreover the Second and the Third Circuits and the Tax Court have held that legislative history does not support the conclusion that the word "transfer" has a different meaning in Subsection (b) from what it has in Subsection (a), as respondent argues, and as the court below held. (Pet. 5, 8, 9, A7-A9.)

Respondent's argument that all three *per curiam* decisions decided by this Court on March 2, 1931 upon the

authority of *May* v. *Heiner*, 281 U. S. 238, 74 L. Ed. 826, 8 AFTR 10904 (1930), were irrevocable trusts, in support of his contention that the March 3, 1931 Joint Resolution and subsequent remedial legislation, including Sec. 2036(b) of the present Code, were applicable only to irrevocable trusts, is erroneous. (Br. 5.)

One of these *per curiam* decisions, *McCormick* v. *Burnett*, 283 U. S. 784, 75 L. Ed. 1413, 9 AFTR 1000 (1931), *rev'g Comm.* v. *McCormick*, (CA Seventh, 1930), 43 F 2d 277, 9 AFTR 64), involved a trust in which the settlor retained income for life and also reserved the *power to terminate the trust* at any time by delivering to the trustee an instrument signed by herself and by one or more of her three children, each of whom was entitled to receive one-third of the income after the settlor's death and also entitled to dispose by will of his share of the income after his own death. *Upon termination of the trust, the trust fund was to be payable to the settlor.* (See 43 F 2d at pp. 277, 278; 9 AFTR at pp. 64, 65.) This decision clearly supports the holdings of the Second and Third Circuits and the Tax Court that the remedial legislation beginning with the Joint Resolution of March 3, 1931 and ending with Sec. 2036(b) of the present Code was intended to apply to revocable and to irrevocable transfers.

3. As stated by respondent, the facts in the various cases decided by the different courts have not been the same. (Br. 8.)

In the *Canfield*, *Brenner* and *Battle* cases, the settlor retained the income for life and also a power of testamentary disposition of the corpus and surrendered the power after March 3, 1931. (Pet. 5, 6.)

In the *Ridgway* and *Carlton* cases the settlor retained the income for life and a power to change the terms of distribution of the income or principal and relinquished the power after March 3, 1931. (Pet. 6.)

In the *Smith* case, the settlor's husband, who was trustee without any interest in the income or principal, had the power to revoke the trust and died after 1931, thus terminating the power. (Br. 7.)

In the *Studebaker* case, the settlor alone had the power to revoke the trust and surrendered the power after 1931. (Pet. 5.)

In the instant case, the trust was revocable only through the exercise of a joint power, which ended not by any action on the part of the decedent, but solely as a result of the death of the other owner of the joint power.

Despite these factual differences, the sole issue in all of these cases was a legal question—whether the word "transfer" in the limitation provision which is applicable to transfers before March 4, 1931, has the same meaning as the word "transfer" in the general rule, which is applicable to transfers after March 3, 1931.

4. Respondent states that no other case is known which involves an issue relating to "revocable trusts with a retained life estate created before March 4, 1931, and which remained revocable until after that date." (Br. 9.) We have shown that the same legal issue has arisen in cases involving powers of testamentary appointment, powers to change the terms of distribution of the income and principal, and powers to revoke by the settlor alone or by a person without any interest in the income or the principal. Respondent did not state whether any cases of the latter type were known—cases which involve the same legal issue that is involved in the instant case.

It would be idle speculation to conjecture how many cases may arise in the future involving the question of whether the word "transfer" has the same meaning in the Limitation Provision in Subsection (b) as it has in the General Rule in Subsection (a) of Sec. 2036 of the Code. There is no assurance that none will arise, and if

any should, the courts below will be confronted with the same conflict that exists now.

Petitioner submits that the petition for a writ of certiorari should be granted or denied on the grounds stated in the petition and not on mere surmise that no cases involving the meaning of the word "transfer" in Subsection (b) of Sec. 2036, IRC 1954, will arise in the future.

CONCLUSION

The petition for a writ of certiorari should be granted in order to resolve the conflict between the Second and Third Circuits and the court below.

Respectfully submitted,

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